No. 84-1311

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IN THE

Supreme Court of the United States

October Term, 1984

GEORGE W. BONIN
Petitioner

vs.

AMERICAN AIRLINES, INC. and
THE AMERICAN AIRLINES, INC. PILOT RETIREMENT PLAN
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Questions Presented

I. Does an applicant for disability benefits under an ERISA-based pension plan have no right nor entitlement to an independent adjudication of the continuing existence of a previously established permanent disability when:

(a) He received disability retirement pension benefits from 3-1-74 through 10-2-75;

(b) He was returned to work under a one year "conditional" agreement;

(c) Within 3 months of returning to work, he suffered a relapse into alcoholism and was involved in an off-duty incident, bringing embarrassment to Company Respondent, who fired him for such incident on March 18, 1976;

(d) Arbitrator decided the only question before him, i.e. Petitioner was fired for "just cause";

(e) Plan Administrator denied Petitioner's claim for continuing disability benefits on basis that Petitioner was discharged for reasons "other than medical" and Plan provides for entitlement only to a member who "is terminated by reason of Disability";

(f) Plan provides that "Administrator shall be bound by determinations pursuant to (collective bargaining) Agreement . . . affecting such issues as discharge of a Member . . . and Administrator shall not administer the Plan in any manner inconsistent with such final determinations . . ."?

II. Did the court of appeals make numerous errors in affirming the district court's denial of Petitioner's claim for disability benefits, with the result that no one person, nor committee, nor any body of authority had any duty to deter-

mine the actual existence (or non-existence) of Petitioner's "disability" at any time following his discharge, notwithstanding the circumstances described above?

III. Were ERISA protections denied Petitioner when Plan Administrator did not undertake his fiduciary duties to act on behalf of the Petitioner, i.e. to not seek medical verification of the claim nor to timely provide requested plan documents?

IV. Was the Petitioner's rights to due process denied when the Plan Administrator failed to follow Plan terms for claim procedures by:

(a) Not recognizing the pre-existing medical condition that directly caused the discharge, and

(b) Not developing the required medical verification of the claim?

V. Was Petitioner discharged (rather than returned to disability status), as a deliberate intention of the Respondents, so as to not have to pay Petitioner lifetime disability benefits, thus resulting in a direct interference with the rights of the Petitioner, which rights are specifically protected by ERISA?

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IN THE

SUPREME COURT of the UNITED STATES

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No._____

GEORGE W.BONIN,
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vs.

AMERICAN AIRLINES, INC. and THE AMERICAN AIRLINES, INC. PILOT RETIREMENT PLAN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the opinion and judgment of the court of appeals of the Fifth Circuit rendered in these proceedings on July 10, 1984, with Petition for Rehearing denied on August 23, 1984.

Opinions Below

On January 29, 1979 the United States District Court for the Northern District of Texas entered an opinion approving Respondents' Motion to Dismiss, for lack of subject matter jurisdiction. It appears at A1. The United States Court of Appeals for the Fifth Circuit reversed the decision of the District Court on June 24, 1980, holding that the District Court had subject matter jurisdiction under Sec. 502(a) of ERISA, 29 U.S.C. §1132(a), and remanded the case for further proceedings. The opinion is reported at 621 F. 2d 635. It appears at A2. On May 17, 1983, the United States District Court for the Northern District of Texas entered judgment, with opinion, denying all Plaintiff's claims. The opinion is recorded at 562 F. Supp. 896. It appears at A22.

On July 10, 1984, the United States Court of Appeals for the Fifth Circuit entered judgment, with opinion, affirming the decision of the District Court. This opinion is unreported and appears at A27.

Jurisdiction

The judgment of the court of appeals was entered on July 10, 1984 (A27) and rehearing was denied on August 23, 1984 (A33). The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

Statement of the Case

1. Nature of the Case

Petitioner filed this action pursuant to Section 502(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1132(a), seeking to recover his benefits, to enforce his rights and to clarify his rights to future benefits under the terms of the American Airlines, Inc. Pilot Retirement Benefit Plan. The Petitioner seeks reinstatement to disabi-

lity status and filed a claim for the continuing disability benefits following: (a) his leaving disability status on October 2, 1975 to return to work on a one year conditional agreement, (b) his relapse into depression and alcoholism causing an off-duty incident, and (c) which resulted in his discharge. Respondents have denied any obligations to reinstate the disability benefits since he was discharged "for other than medical reasons."

Petitioner's complaint asserts claims against Respondents for breach of their fiduciary duties as owed to Petitioner as a claimant under an ERISA-based plan for (a) not following Plan terms requiring the Plan Administrator to medically verify the disability claim, and (b) not discharging the duties with respect to the plan solely in the interest of the participant nor discharging their duties

with the care, skill, prudence and diligence required by a Plan Administrator - fiduciary.

Jurisdiction is invoked under 29 U.S.C. §1132(a), Sec. 502(a) of ERISA, granting jurisdiction to a participant to recover benefits due to him under the terms of his plan, to enforce his rights and to clarify his rights to future benefits under the Plan.

2. **Relevant Facts**

Petitioner was employed by American Airlines, Inc. in October, 1964 and progressed from a flight engineer to the position of Captain. In 1971, he suffered mental problems, to wit, chronic depressive neurosis and chronic alcoholism. In 1973 he was removed from flight status and granted sick leave. In February, 1974 he applied and was granted a disability pension by American who also serves as the Plan Administrator. On

October 2, 1975, Petitioner was required to "conditional" sign a personal agreement whereby he would be returned to flight status. The agreement had numerous conditions and, in part, required:

> ". . . If at any time during this period or subsequent period, if such are deemed necessary, any conditions as outlined are not adhered to the program will be terminated and appropriate action initiated."

Following Petitioner's return to active flight status, he was involved in an off-duty incident on January 18, 1976, and by letter dated March 18, 1976 was terminated. At trial, the employee of American that decided how the Petitioner was to be terminated testified he had fully investigated the case and Petitioner's acts "were not those of a well man". The same employee also testified Petitioner was terminated because he was an embarrassment to American Airlines.

During a hearing on April 20, 1976, Petitioner requested investigation of Ameri-

can Airlines, Inc.'s refusal to allow him to reestablish his eligibility for disability benefits. On April 27, 1976, the company responded by letter saying:

> ". . .If you wish to make application for disability benefits, even now, I see no bar to this. However, the application could not be processed in a manner inconsistent with the facts and the decision in this case." (i.e. the discharge matter)

On May 19, 1976, Petitioner filed application for continued payment of his disability benefits. On June 16, 1976, he requested information about the claim and was told by company letter dated June 18, 1976:

> ". . .due to the fact there is a grievance pending on your termination. . ." (there will be) "no action taken on your application for disability pension pending the outcome of the appeal of the termination."

On November 30, 1976, Petitioner's counsel requested information about his claim and information concerning Plan claim procedures. On December 20, 1976, the company sent a letter stating that a

claim for benefits could not be made by a "non-employee" and that no claim action would be taken until completion of arbitration of the discharge. In response to a June 30, 1977 letter from Petitioner's counsel asking for information about the application, the company responded by letter dated August 8, 1977 that:

> ". . .until a final determination is made on Mr. Bonin's discharge, a claim for disability benefits, which are only payable to employees of the Company, cannot be reviewed or acted upon." (emphasis added)

On October 11, 1977, Petitioner's counsel specifically requested applicable Plan provisions and necessary documents so as to determine Petitioner's rights. Appellee, American Airlines, Inc., responded by letter dated October 24, 1977 denying the appropriate references and not responding to the request for documents. This action was filed on March 9, 1978. Petitioner was ordered by the District Court to proceed with arbitration. The

District Court's Order stated he would not be harmed. On September 28, 1981, the Award of the System Board of Adjustment determined that the Petitioner was terminated for "just cause" by his employer, but did not make any determination to disability payments under the pension plan. On October 30, 1981, Petitioner was advised by letter that his application for disability benefits had been denied due to Petitioner's having been discharged for cause. At trial, the witness representing American Airlines as Administrator admitted the normal procedure for processing a disability claim was not used in Petitioner's case. The normal procedure, as required by the Pension Plan provisions, are to submit the matter to American Airlines Medical Department for determination if the applicant is disabled. If there is a disagreement then the matter is to be sub-

mitted to arbitration. American has never contested that Petitioner was and is disabled, but contends the Petitioner was not eligible for benefits because it was determined by American that he should be terminated for cause and not for medical reasons.

Stipulated facts in the pre-trial order, dated December 14, 1982, include, "Mr. Bonin is fully vested in the Pension Plan and was first eligible to join the Retirement Benefit Program on January 1, 1966". An EBS-1 Form filed by American before Petitioner was terminated stated disability pension benefits are fully vested upon becoming disabled.

The reason for the off-duty incident was a reoccurrence of the same condition for which a disability pension had previously been granted. The disability pension is fully contained in American's Pension Plan and is not a separate Plan main-

tained by the employer. Petitioner's disability renders him unable to continue as a pilot due to required medication.

3. **Proceedings in the Lower Courts**

The original action was dismissed for lack of jurisdiction. The Fifth Circuit reversed the decision of the District Court in an opinion dated June 24, 1980, held the District Court had subject matter jurisdiction under Sec. 502(a) of ERISA, 29 U.S.C. §1132(a), and remanded the case for further proceedings. The District Court suspended its own proceedings until the arbitration process concerning Petitioner's discharge was completed. After the arbitration, the District Court heard the case and issued its opinion in favor of the Respondents. The following sets forth his reasoning:

> "In short a member of Defendant's Pilot Retirement Benefit Plan is only entitled to a disability benefit before retirement age when:

1) he or she is terminated as a pilot because of a disability, and
2) he or she is also no longer employed by Defendant.

Plaintiff was terminated by Defendant for cause and not because of a disability. His proper forum for challenging his termination for cause was the grievance and arbitration procedures of his union and Defendant. As Defendant in its other capacity as Plan Administrator must abide by the outcome of the arbitration, its decision to deny disability benefits was correct and, of course, not arbitrary and capricious."

Notwithstanding the Petitioner's reminding the court of appeals that he was not seeking a review of the Petitioner's discharge, and was only attempting to have a fair adjudication of whether Petitioner was disabled prior to his discharge and whether he was entitled to a reinstatement of his previous disability status the court of appeals affirmed the decision of the District Court.

The court of appeals reasoning was similar to the District Court but found

an inapplicable provision in a later revised plan to emphasize its point:

> "Under the Pilot Retirement Benefit Plan, disability benefits are due only to a member who "is terminated by reason of Disability." The Plan defines "Disability" to comprise any "illness or injury . . . which prevents a Member from continuing to act as an Active Pilot Employee in the service of the Company, other than . . . (2) alcoholism showing no progress toward recovery after two years. . ." (emphasis added).

It is important to note that the court of appeals emphasized the "other than" provision concerning alcoholism. This provision was added to the plan effective April 1, 1975,during the time the Petitioner was receiving benefits. He received disability benefits for alcoholism until he was "conditionally" returned to employment on October 2, 1975. Just as significant is the fact that Article XVI of the Plan, was not amended effective April 1, 1975. This article protects Petitioner from being adversely affected by the newly added "other than" provis-

ion. Article XVI of the Plan reads, in part, as follows:

"Modification or Discontinuance

1. The company expects to continue the Pilot Retirement Plan indefinitely, but necessarily reserves the right to modify, suspend or discontinue it at any time, including but without limiting the generality of the foregoing, modification, suspension or discontinuance in its entirety or with respect to any feature thereof. However, any modification, suspension or discontinuance shall not adversely affect the benefits provided under the Pilot Retirement Plan for any Member or beneficiary as of the date of such modification, suspension or discontinuance." (emphasis supplied)

The Supplement F portion of the collective bargaining agreement which set forth the agreed-upon changes to the Retirement Plan, also shows the intent to protect members of the plan on the effective date (April 1, 1975) of the amendment, as follows:

"4. A pilot employee who was a member of the Pilot Plan as it existed on the day before the effective date of the Agreement pertaining to current negotiations shall not lose any accrued rights as a result of these amendments".

The court of appeals supported their finding that Petitioner was suffering from alcoholism and not depression (notwithstanding medical testimony at the trial to the contrary) when it quoted the arbitrator's decision as follows:

> "there cannot be the slightest doubt that Captain Bonin's problem was alcoholism . . . It appears clear that the Company has been patient in its effort to have Captain Bonin benefit from its alcohol control program, but there has been no sustained improvement. There is no doubt that just cause for the termination has been shown."

The court of appeals erred in relying upon the arbitrator to determine Petitioner's disability. It was not the arbitrator's duty to determine Petitioner's illness nor disability, it was his sole duty to only determine whether or not Petitioner was discharged "for cause". It was the Plan Administrator who had the duty to determine Petitioner's disability - <u>not</u> the Arbitrator. The court of appeals found the Plan Ad-

ministrator was "under no duty . . . indeed, was not permitted . . . to make an independent inquiry into the cause for Bonin's firing" since the plan provides that "in administering the Plan, the Administrator shall be bound by any determination pursuant to the Agreement between American Airlines and the Air Line Pilots . . . affecting such issues as discharge of a Member . . . The Administrator shall not administer the Plan in any manner inconsistent with a final determination under such Agreements." (Sec. 12.4 of Plan)

The Petitioner asks that a court place the duty on the Plan Administrator to determine the Petitioner's disability, including a determination as to Petitioner's disability before the discharge. The Plan Administrator's fiduciary duty to the Petitioner did not end when Peti-

tioner was discharged as the court of appeals suggested in its opinion.

The court of appeals concluded that the Arbitrator:

> ". . .scrupulously avoided considering Bonin's claim of entitlement to disability benefits, and did not intrude into administration of the Plan "as such." It was for the Plan Administrator to determine the <u>effect</u> of the Board's findings on Bonin's claim to benefits under the Plan, but the Plan manifestly requires the Administrator not to second-guess the Board's factual findings."

Petitioner never expected the Plan Administrator to second-guess the Arbitrator's factual findings - <u>as to the discharge</u> but the Plan Administrator not only had the right to determine the existence of Petitioner's disability, it had an obligation to do so. The Plan required the Plan Administrator to make that decision. The final line to Sec. 12.4 of the Plan reads:

> "Notwithstanding any other provision of this Plan, neither the <u>interpretation</u> of the Plan nor its <u>administration</u> shall as such be within the

> jurisdiction of the Agreements" (of the collective bargaining agreements). (emphasis added)

The Plan Administrator, not the Arbitrator, is to interpret and administer the Plan. The court failed to place upon the Plan Administrator its ERISA duty, as a fiduciary, to determine Mr. Bonin's disability. The application for reinstatement of disability was a separate and distinct matter for the Plan Administrator to review. Nevertheless, the court of appeals concluded:

> "In sum, at the time of his termination Bonin was not suffering from any "disability" as that term is defined in the Pilot Retirement Plan."

Before the Trial Court the representative of the Plan Administrator was asked if it had been decided Petitioner should be terminated for a medical reason, would that have changed Administrator's opinion as to how the disability should have been handled? The witness stated "You are not terminated for medical reasons".

By allowing the Plan Administrator to not look beyond the discharge issue permits the Plan Administrator to avoid his duty under ERISA and under the terms of the Plan and not be required to determine the existence of a continuing disability. For the court not to recognize the co-existence of two issues, (1) discharge and (2) determination of disability, was clearly a misapplication of fact and law. Rightful or wrongful discharge deals with employment status. Determination of disability is entirely different and deals with pension status. Whether or not one is entitled to a disability pension is dependent upon whether or not the person is disabled. The two issues are separate, co-existing issues.

Both courts have held that the Plan Administrator needed to only determine that the Petitioner was <u>discharged</u> for reasons "other than medical" or was not <u>termi-</u>

nated for disability. No further requirements, indicate both courts, need be considered, such as the facts and circumstances causing the discharge, the Petitioner's prior disability, his readily available medical history, the conditional return to work, etc.. As a matter of fact, neither court, in its opinion, addressed these facts - they only reviewed the cold, hard language of the plan that said, in essence, in order for one to be eligible for a disability, he had to be terminated for such disability. Both courts reasoned that since the Petitioner was discharged "for an off-duty incident embarrassing to the company", then he could not have been discharged for disability. The facts presented at trial show, and it was admitted at oral argument before the court of appeals, that Petitioner was terminated due to a reoccurrence of the same disability for

which he had previously been granted a disability pension.

The District Court quoted Plan Sec. 6.4, which begins with these words:

> "Disability of a member. A Member whose employment as an Active Pilot Employee is terminated by reason of Disability prior to Normal Retirement Date shall be entitled to receive Normal Retirement Benefits commencing at the later of Normal Retirement Date . . . If such Member does not continue to be employed by the company, he or she shall be entitled to receive a Disability Retirement Benefit commencing ninety days after the later of the commencement of such Disability . .."

The District Court determined that:

> "In short a Member of Defendant's Pilot Retirement Benefit Plan is only entitled to a disability benefit before retirement age when:
>
> 1) he or she is terminated as a pilot because of a disability, and
> 2) he or she is also no longer employed by Defendant.
>
> Plaintiff was terminated by Defendant for cause and not because of a disability."

In affirming the District Court's opinion, the court of appeals took a similar line of reasoning when it deter-

mined that the plan prohibited the Administrator from administering the Plan in any manner inconsistent with a final determination under such Agreements (the Collective Bargaining Agreement). The court of appeals concluded:

> "It follows that the Plan Administrator was under no duty - indeed, was not permitted - to make an independent inquiry into the cause for Bonin's firing. . . . It was for the Plan Administrator to determine the effect of the Board's findings on Bonin's claim to benefits under the Plan, but the Plan manifestly requires the Administrator not to second-guess the Board's factual findings."

It is should be noted that neither court's opinion discussed the facts and circumstances causing the discharge, the conditional return to work by the Petitioner, the short three month period of return to work, nor the medical history readily available to the Plan Administrator from his prior disability file. In addition, neither court's opinion discussed ERISA's requirements involving the

Plan Administrator's fiduciary duty to act "solely in the interest of the participant" (ERISA Sec. 404, 29 U.S.C. §1104), nor the participant's ERISA rights to not have his entitlement to benefits interferred with by a "discharge". (ERISA Sec. 510, 29 U.S.C. §1140) Further, neither the District Court or Appellate Court considered the Administrator's statement that one is not terminated for medical reasons. The District Court had determined that one must be terminated as a pilot because of a disability. However, the testimony was that this could not in fact occur.

Without the facts and the law being fully developed by either court, the participant was denied his full due process rights and both courts have erred so significantly that all Plan Participants could be denied disability benefits by the simple method of rehiring them, then

discharging them for "reasons other than medical". This result would have a grave impact on all pension plans in this country that have similar disability provisions.

Petitioner also claims that the $100 per day fine should be assessed Respondents for failure to provide Petitioner was plan documents in a timely manner was required by ERISA Sec. 502(c) or 29 U.S.C. §1132(c). within 30 days of the request. Penalty is sought for period November 11, 1977 until April 7, 1978. Counsel had to be hired to obtain the documents. The Plan Administrator testified the delay was based upon confusion about the Petitioner's grievance, as well as the changes in personnel and complications arising from attempts to comply with ERISA during that time. The District Court determined (at A26) it did not see any reason why the Defendant

should be punished. The court of appeals (at A28) agreed with the District Court. Both courts relieved the Plan Administrator from a responsibility, notwithstanding the fact the ERISA was already three years old, the documents were readily available, the fiduciary duty of the Plan Administrator to discharge his duties solely in the interest of participants was in place and operational, and there was substantial precedent to award such fine in like circumstances.

REASONS FOR GRANTING THE WRIT

I. The decision below is at variance with other Federal Courts of Appeal decisions on the same matter.

The court below erred in not finding, (1) a fiduciary breach of duty by the Plan Administrator, (2) an incorrect interpretation of the Plan by the Plan Administrator, as well as (3) an arbitrary and capricious decision of denial by the Plan

Administrator. At minimum, the case should have been remanded to the Plan Administrator for a disability determination based on the evidence in the file or referred to American's Medical Department. The court of appeals allowed the administrator's decision to stand based simply on the words of the Plan, which stated that an employee could receive disability benefits only if he were "terminated for disability". The Administrator testified this does not occur. Failure to review the circumstances or the proximate cause of the termination was a failure of the court of appeals to recognize the fiduciary duties of ERISA and the considerable body of law enunciated in various courts of appeals decisions regarding the arbitrary and capricious standard of review. Failure of the court to recognize the significant fiduciary duties placed upon a Plan Ad-

ministrator is a gross error of the Fifth Circuit to recognize the entire purpose of ERISA to protect the benefits of participants in retirement programs and the long history of this court and many court of appeals decisions in recognizing the fiduciary duties of those entrusted with the administration of pension plans. The Fifth Circuit failed to take cognizance of its own initial decision in this case where it discussed the "agrieved employees being left without a remedy in seeking to recover benefits", and the ERISA statute's policy to "protect the interest of participants in employee benefit plans, . . . by establishing standards of conduct, responsibility and obligations for fiduciaries." (see A13) Due to the number of participants who might lose their pension benefits as a result of such irresponsible plan interpretation and plan administration, this

Court should review the decisions of the various courts of appeal and submit distinct guidelines with respect to the interrelationship of the arbitrary and capricious standard of review and the fiduciary duties enunciated under ERISA. Failure of this Court to render a decision encompassing these two principles of law will result in continued confusion as to a plan participant's rights and a Plan Administrator's duties toward that participant. The following court of appeals cases show the confusion which reigns among the circuits with respect to the arbitrary and capricious standard.

The two cases relied on by the Fifth Circuit in this area of the law are the Paris and Bayles cases. Both cases held, in essence, that the actions of the trustees in the administration of the pension plan must be sustained as a matter of law unless the plaintiff can prove such ac-

tivities have been arbitrary and capricious. Paris v. Profit Sharing Plan for Employees of Howard B. Wolf, Inc., 634 F2d 357, 362 (5th Cir.), cert. denied, 454 U.S. 836, 102 S.Ct. 140, 70 L.Ed 2d 117 (1981); Bayles v. Central States, Southwest Areas Pension Fund, 602 F2d 97, 99, 100 n. 3(5th Cir. 1979). In the Bayles decision the court set forth the following factors to be considered in applying the arbitrary and capricious standard; (1) uniformity of construction, (2) "fair reading" and reasonableness of that reading, and (3) unanticipated cost. In August, 1982 the Fifth Circuit remanded the case of E. D. Hayden v. Texas U.S. Chemical Co., 681 F2d 1053 (5th Cir. 1982) back to the District Court in order to determine if ERISA applied. In addition, it cited the Paris and Bayles cases when it said:

> "If the company's decision is found to be susceptible to legal challenge,

> that decision must be reviewed for arbitrariness or capriciousness". (at p. 1058)

In February, 1983 District Court Judge Joe J. Fisher found in the Hayden case, 557 F. Supp 382 (E.D. Tx 1983) that ERISA applied, that the actions of the employer were arbitrary and capricious, and the plan administrators did not act in good faith in deciding the claim for disability benefits. In his decision he expressed his grave concern over the Fifth Circuit's requirement of meeting the "arbitrary and capricious" standard:

> "It allows an employer to breach his employees' compensation contract with impunity, so long as the employer does not do so in an "arbitrary or capricious" manner. The administrator may be stupid, or simply ignorant, or ill-advised on the meaning of the contract. No matter. He may breach and breach against, yet the employee cannot enforce his rights. . . . He can enforce those valued rights, however, if and only if he can prove the contract's breach to be "arbitrary and capricious". This is an absurd requirement.
>
> By injecting the nebulous terms "arbitrary and capricious" into the analy-

> sis of contracts, the court retards the rational resolution of dispute. Basic contract concepts in terms do not, of course, convey absolute precise meaning. But they carry substantially more meaning than the slippery concept of "arbitrary and capricious." Requiring that "standard" of review makes for a paucity of legal analysis. It substitutes conclusionary phrases for specific supporting factual determinations. (at p. 389 and 390)."

In July, 1982 the Fifth Circuit decided Dennard v. Richards Group, Inc. 681 F2d 306 (5th Cir. 1982). Here, again, the court relied on Paris and Bayles, but found them to not be totally applicable. The court discussed other circuits' opinions:

> "Federal Courts have applied the arbitrary and capricious standard both to ambigious and unambigious terms. A rational and reasonable interpretation of a Plan may still be arbitrary and capricious if contrary to the plain meaning of the Plan. "Where the trustees impose a standard not required by the pension plan itself, this court has stated that such action would result in an unwarranted and arbitrary construction of the Plan". Morgan v. Mullins, 643 F2d at 1321 (8th Cir. 1981), quoting Maness v. Williams, 513 F2d at 1267 (8th Cir. 1975).

> The Seventh Circuit, in applying the arbitrary and capricious yardstick, has stated that this standard apparently originated with the District of Columbia Circuit's formulation of "whether the trustees have acted arbitrarily, capriciously, or in bad faith; that is, is the decision of the trustees supported by substantial evidence or have they made an erroneous decision on a question of law." Wardle v. Central States, Southeast and Southwest Areas Pension Fund, 627 F2d at 823. (at p.314)

The Wardle case contained the "substantial evidence" and the "erroneous decision on a questions of law" standards from Danti v. Lewis, 312 F2d 345, 348 (D.C. Circuit 1962) and the Rehmar v. Smith decision, 555 F2d, 1362, 1371 (9th Cir. 1976). The Wardle case was denied certiorari, 449 U.S. 1112, 101 S. Ct. 992, 66 L. Ed. 2nd 841 (1981).

In a very recent case, Offutt v. Prudential Insurance Company of America, 735 F2d 948 (5th Cir. 1984) the Fifth Circuit determined that the "substantial evidence" standard could not be used in that circuit because of prior decisions of

other panels in said circuit (Paris and Bayles), although the court said that the same result would have occurred (at p. 950).

The Tenth Circuit opinion of Peckham v. Board of Trustees, 653 F2d 424, (10th Cir. 1981) found:

> "A decision to deny benefits under a plan covered by ERISA will be overturned when (1) arbitrary and capricious, (2) not supported by substantial evidence, or (3) erroneous on a question of law." (at p. 426)

In the Ninth Circuit, in Hurn v. Retirement Trust of Plumbing, Heating and Piping Industry of Southern California, 703 F2d 386 (9th Cir. 1983) the Court introduces the "structural defect" test where an employee can show violation of the "arbitrary and capricious, unsupported by substantial evidence, instituted in bad faith, or erroneous on question of law" standards, by establishing the exclusion of a large number of employees from benefits for no apparent reason.

The court indicated that the "structural defect" test is not limited to group violation, as "the test extends to rules that arbitrarily exclude individual employees from their chance at benefits . . . Rules that deny individual employee's benefits for reasons irrational on their face are also inconsistent with the trustees' obligation to administer the trust in the "sole and exclusive benefit" of all employees." (at p. 390).

Also in the Ninth Circuit, Harm v. Bay Area Pipe Trades Pension Plan Trust Fund, 701 F2d 1301 (9th Cir. 1983) tied ERISA section 404 (fiduciary responsibility) into the "structural defect" test, and shifted the burden to the trustees to show a rational connection between their rules and the fund's purposes.

In the Second Circuit, in Miles v. New York State Teamsters Conference Pension and Retirement Fund Employee Pension

Benefit Plan, 698 F2d 593 (2nd Cir. 1983) the court expanded on the Maness (supra) decision:

> "Where the trustees of a plan impose a standard not required by the plan's provisions, or interpret the plan in a manner inconsistent with its plain words, or by their interpretation render some provisions of the plan superfluous, their actions may well be found to be arbitrary and capricious." (at p. 599).

In the Fourth Circuit, Horn v. Mullins 650 F2d 35 (4th Cir. 1981) the court cited the 1962 Danti case (supra) and found that the "critical factor in this case is the date of disability determined . . . after careful consideration of the conflicting evidence." (at p. 37). This case can be compared to the instant case, where the Fifth Circuit found that it was not necessary to determine when the Petitioner's disability commenced and yet there was "substantial evidence" to prove that the date of disability was well

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EDITOR'S NOTE

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before the termination date of the Petitioner.

In another Fourth Circuit case, Seafarers Pension Plan v. Sturgis, 630 F2d 218 (4th Cir. 1980) the court found the trustees' mechanical application of the break in service rules resulted in the denial of the claimant's pension claim and thus held that to be "arbitrary and capricious". Again, this is quite similar to the instant case where the plan administrator "mechanically" determined that the Petitioner was terminated "for reasons other than medical" and, therefore, could not have been disabled at the time of his discharge.

In the Sixth Circuit, Odom v. United Mine Workers of America Health and Retirement Fund, 687 F2d 843, (6th Cir. 1982) found that a pre-existing condition was aggravated by an accident on the job. The trustees had held that the pre-exisiting

condition made the claimant ineligible for disability pension. The court of appeals found that the evidence overwhelmingly established that the accident did contribute to his disability. (at p. 847). Again, similar to the instant case, the Petitioner had a "pre-existing condition" (i.e. prior to his termination of employment) but the Fifth Circuit did not find the need to review the fact that the Petitioner's termination was caused by his pre-existing disability.

In the Third Circuit, Rosen v. Hotel and Restaurant Employees and Bartenders Union of Phila., Bucks, Montgomery and Delaware Counties, P.A., 637 F2d 592 (3rd Cir. 1981), certiorari denied, 454 U.S. 898, 102 S. Ct. 398, 70 L Ed. 2d 213 (1981). The court cited Rehmar, supra, wherein both courts agreed:

> "Although this is a limited standard of review, "it leads neither to abdication of traditional judicial control of fiduciaries nor to excessive judi-

> cial intervention in trust operations, in harmony with federal labor policies". Rehmar v. Smith, 555 F2d 1362, 1371 (9th Cir. 1976)." (at p. 596)

In the Eleventh Circuit, Fine v. Semet, 699 F2d 1091 (11th Cir. 1983), the court held:

> "Although the agreement is thus couched in terms of absolute discretion, this court has held that such broad grants of discretion do not give trustees unbounded and absolute authority in administering employee welfare plans." (at p. 1093) (emphasis added)

The court below failed to even discuss the Plan Administrator's duties as a fiduciary under ERISA, notwithstanding considerable discussion in briefs as well as oral argument. The court of appeals in its initial decision determined that this case was subject to ERISA jurisdiction but in its second decision it failed to address the pertinent ERISA provisions applicable to the administration of the Plan other than to say the Plan Administrator did not breach a fidu-

ciary duty to warn Petitioner of a potential loss of benefits.

The Plan Administrator was a fiduciary, even though it also was the Petitioner's employer at the time. There was a "conflict of interest", but this was to be protected by the fiduciary duties as imposed by ERISA. These duties should have been fully developed as they applied to the Petitioner's set of circumstances (i.e. a "conditional" return to employment and the effect of his inability to complete the terms of that "conditional agreement", the unnecessary delays in providing the Petitioner with copies of necessary documents, the delays associated with the determination of "just cause" discharge, the failure of the Plan Administrator to review the readily available medical evidence, and the bald-faced conclusion as to his non-eligibili-

ty to disability benefits without specific reasons, etc..

Other Federal Court of Appeal decisions have set forth the standards for fiduciaries administering ERISA-based plans. In Rosen, supra the court found a fiduciary breach when the pension fund trustee failed to notify the pensioner of his employer's failure to contribute to the fund as required by the pension agreement. The court cited ERISA Sec. 404, 29, U.S.C. §1104 where the fiduciary is required to:

> "Discharge his duties with respect to a plan solely in the interest of the participants and their beneficiaries and
> (A) for the exclusive purpose of:
> (i) providing benefits to participants and their beneficiaries; and
> (ii) defraying reasonable expenses of administering the plan;
> (B) with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like char-

> acter and with like aims; . . ." (at p. 599) (emphasis added)

The court further showed the legislative intent of the drafters of ERISA with respect to this fiduciary obligation. The court continued:

> "The Chairman of the Senate Committee on Labor and Public Welfare, providing a context for these standards, emphasized the need for a uniform body of federal law founded on the principles of common law trusts:
>
> The legislation (ERISA) imposes strict fiduciary obligations on those who have discretion or responsibility respecting the . . . handling . . . of . . . plan assets; . . . and to provide effective remedies of breaches of trust.
> 120 Cong. Rec. 15737 (1974) (Comments of Sen. Williams when introducing the Conference Report), reprinted in, (1974) U.S. Code Congr. & Ad. News 5177, 5186. This language indicates that in applying the fiduciary standards of ERISA, courts are to be sensitive to the need for uniformity in the interpretation of pension trustee's obligations." (at p. 599) (emphasis added)

In Donovan v. Bierwirth, 680 F2d 263 (2nd Cir. 1982), certiorari denied 459 U.S. 1069, 103 S. Ct. 488, 74 L. Ed. 2d 631 (1982), the court discussed ERISA section

404 and the duties of officers of corporations who also happen to be trustees of its pension plan and the need for discussions that must be made with an eye single to the interest of the participants and beneficiaries. (at p. 271)

In a footnote, the court quoted Justice Frankfurter in a decision of this court, as follows:

> "However, as Justice Frankfurter observed in a famous passage, "to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary?" SEC v. Chenery Corp. 318 U.S. 80, 85-86, 63 S. Ct. 454, 458, 87 L. Ed. 626 (1943). The fiduciary obligations of the trustee to the participants and beneficiaries of the plan are those of a trustee of an express trust - the highest known to the law. Restatement of Trusts 2d Sec. 2, comment b (1959)." (at p. 272)

In Hurn, supra the court referred to this court's addressing the issue of the Taft-Hartley provisions paralleling the ERISA provisions and that the trustees must meet the requirements of each. In its

decision, at p. 388 it quoted Supreme Court case, NLRB v. Amax Coal Co., 453 U.S. 322, 330, 101 S. Ct. 2789, 2794, 69 L. Ed. 2d 672 (1981):

> "Each trustee bears an "unwavering duty of complete loyalty" to employees, id. at 329, 101 S. Ct. at 2974, and this duty "to trust beneficiaries must overcome any loyalty to the interest of the party that appointed him," id. at 334, 101 S. Ct. at 2796."

In Russell v. Massachusetts Mutual Life Insurance Company, 722 F2d 482 (9th Cir. 1983) the court held that processing claims in a perfunctory or arbitrary manner or in bad faith, or without the exercise of reasonable care, constituted a breach of fiduciary duty under ERISA (at 489). The court found ERISA to be a remedial statute enacted "to protect . . . .benefit plans and their beneficiaries . . . . by establishing standards of conduct, responsibility and obligation for fiduciaries of employee benefit plans, and providing for appropriate

remedies, sanctions and ready access to the Federal courts. (29 U.S.C. §1001(b)", and therefore:

> "In light of this explicit congressional policy, we find that ERISA regulates fiduciary conduct not only in the care and management of plan assets, but also in the handling and disposition of claims . . . Under the standard conduct required by ERISA, a fiduciary must process claims in good faith, and in a fair and diligent manner." (at p. 488)

In Rhoten v. Central States Southeast and Southwest Areas Pension Fund, 717 F2d 988 (6th Cir. 1983) the court imposed fiduciary responsibility upon Plan Administrators for failing to advise the claimant of the consequences of his choice of benefits. In Richardson v. Central States Southeast and Southwest Areas Pension Fund, 645 F2d 660 (8th Cir. 1981) the court concluded that the trustees were obligated to set out in opinion form the rational supporting their decision so that Richardson could adequately prepare himself for any further administrative

review, as well as an appeal to the Federal Courts. The court continued:

> "The statute and regulations were intended to help claimants process their claims efficiently and fairly; they were not intended to be used by the Fund as a smoke screen to shield itself from legitimate claims . . . We read the statutes and the regulations to require the board of trustees to issue a written opinion that includes specific reasons for the decision. Bald-faced conclusions do not satisfy this requirements." (at p. 665).

In Wolfe v. J. C. Penney Company, Inc., 710 F2d 388 (7th Cir. 1983) the court cites the Richardson case and stated that the requirement of specifying the pertinent plan provision for denial, may be, in a particular case, essential for the participant to fully apprehend the reason for the denial and to know what deficiency in his application must be overcome. Wolfe was advised that he was not entitled to disability benefits because he was "terminated because of substandard job performance" (at p. 391). The court concluded that the reason given for de-

nial was not a "reason" but a conclusion. (at p. 392)

A summary of the conflict of the lower courts should be of assistance. The Fifth Circuit holds the Administrator's decision must be sustained unless the Plaintiff can prove the Administrator's decision was "arbitrary and capricious". The Eleventh Circuit has found the Fifth Circuit's decisions are binding on their decisions.

The Seventh Circuit added to the arbitrary and capricious standard the words "or in bad faith; that is, is the decision of the fiduciary supported by substantial evidence or have they made an erroneous decision on a question of law". The Sixth Circuit also follows the Seventh Circuit decisions. The Fourth Circuit follows the "substantial evidence" decision of the Seventh Circuit and finds "critical factors" affecting

their cases, while criticizing "mechanical application" of Plan language.

The Eighth Circuit holds the trustees imposing a standard not required by the Plan itself calls for a "unwarranted and arbitrary construction of the Plan". The Second Circuit follows the Eighth Circuit decisions.

The Ninth and Tenth Circuit follow the Seventh Circuit, but both the Ninth and Tenth Circuit added the "structural defect" test where benefits cannot be denied for reasons irrational on their face and inconsistent with the trustees obligation to administer the trust "for the sole and exclusive benefit" of employees. The Ninth Circuit has thus shifted the burden of proof to the trustees to show a rational connection between their rules and the fund's purposes. The Third Circuit has followed the Ninth Circuit decisions.

Applying the standards being used by all circuits (other than the Fifth and Eleventh) the Petitioner's ERISA rights would have been considered and he should have prevailed in his litigation. The fiduciary standards imposed between the circuits are conflicting.

Not only do these conflicting court of appeals decisions not provide a uniform standard of review for fiduciary actions, Petitioner further submits that the Fifth Circuit has not applied the proper standard according to Federal Statutes. ERISA expressly designated that the fiduciaries owe their highest degree of care and a duty to participants so as to not frustrate the intention of Congress to provide and protect pension benefits.

The Fifth Circuit has been reluctant to accept the standards of other circuits, i.e. to determine if the Administrator's decision was based upon "substantial

evidence" or was in "bad faith" or if an error on a question of law or if a "structural defect" caused a denial of benefits. ERISA has not properly been followed by the Fifth Circuit and thus the burden of proof is still on the claimant to provide evidence of "arbitrary and capricious" actions of the Administrator. It is submitted ERISA has shifted that burden to the Administrator to proof that the Administrator has acted "solely in the interest of the participants". This occurs when the participant alleges a breach of the fiduciary duty and submits proof it occurred (in this case failing to follow normal procedures and considering all facts and circumstances). A fiduciary by federal law is required to carry out his duties with the care, skill and prudence owed by a trustee, under a high degree of care. It is submitted the true test required is not

that of arbitrary and capricious, but that required by ERISA. In this case the fiduciary breach was (1) failing to follow normal procedures, (2) failing to consider all relevant facts and circumstances and (3) failing to inform of a potential loss of benefits.

There is a clear need for uniformity among Circuits so as to fully recognize and equally apply ERISA. This case is a prime example of the miscarriage of justice that occurs when a fiduciary is allowed, without regard to fiduciary responsibility to mechanically deny a bona fide valid claim for benefits. In this case the employer decided how Petitioner was to be terminated. The employer could have decided to use medical reasons as opposed to a termination for cause. Can a fiduciary, that knows what occurred and all of the facts and circumstances, totally disregard the truth and

thus pick one form of termination which results in a benefit to the employer (not having to pay the pension) as opposed to the form that results in payment of the benefit? It is respectfully submitted that ERISA and the fiduciary standards imposed preclude this from occurring. The courts in the various circuits are in conflict in their current holdings.

II. The Court below has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this court's power of supervision.

The Petitioner spent much of his working life under the belief he would be entitled to the protection of the disability provision of his pension plan. The decision below excludes him from a proper judicial review of his disability denial. As discussed, the decision below involved a substantial departure from due process

and fundamental fairness in final adjudication of rights that were protected by ERISA. The court upheld a denial of benefits thus stripping Petitioner of property rights in his pension fund without the benefit of the protections of Federal statutory enactments and the protections of the court from the arbitrary and capricious decisions of his Plan Administrator. The court ignored a number of issues raised by Petitioners in their appellate brief that precluded the decision rendered. The court also made findings on the basis of non-applicable plan language and made erroneous conclusions accordingly. The decision failed to account for pertinent facts that showed that the Petitioner was entitled to disability benefits before he returned to work under the "conditional" agreement, was disabled for the three months he worked under that conditional agree-

ment, was disabled when he was discharged, and is still disabled today.

Conclusion

For the reasons set forth above, it is respectfully submitted that this petition for certiorari should be granted to review the opinion and judgment of the court of appeals.

Respectfully submitted,

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APPENDIX

Order of Dismissal
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO.
CA 3-78-0280-C

GEORGE W. BONIN

v.

AMERICAN AIRLINES, INC. and THE
AMERICAN AIRLINES, INC.
PILOT RETIREMENT PLAN

The Court being of the opinion that Defendants' Motion to dismiss should be entered and;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above entitled and numbered suit, wherein GEORGE W. BONIN is Plaintiff, be and the same is hereby dismissed.

This 29th day of January, 1979.

W. M. TAYLOR, SR.
UNITED STATES DISTRICT JUDGE

APPENDIX

Opinion of the Court of Appeals
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-1590

GEORGE W. BONIN,
Appellant,

v.

AMERICAN AIRLINES, INC. and THE AMERICAN AIRLINES, INC. PILOT RETIREMENT PLAN,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

(CIVIL NO. CA 3-78-0280-C)

Argued June 24, 1980

Before: WISDOM, TATE and SAM D. JOHNSON Circuit Judges.

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Counsel for Appellant

OPINION OF THE COURT

TATE, Circuit Judge.

The plaintiff files this action pursuant to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C.§§1101, et seq., seeking primarily to recover his benefits, to enforce his rights, and to clarify his rights to future benefits under the terms of the American Airlines, Inc. Pilot Retirement Benefit Plan. The sole issue presented by this appeal is whether the District Court properly dismissed the complaint for lack of subject matter jurisdiction because the wrongfulness of plaintiff's discharge had not yet been decided by arbitration under the Railway Labor Act, 45 U.S.C. §§151 et seq. This case presents a jurisdictional issue of first impression in this Circuit, the resolution of which necessitates examination of the scope and interplay of ERISA and

the Railway Labor Act. We conclude that the District Court in this case has been conferred jurisdiction over plaintiff's pension claim under Section 502(a) of ERISA [29 U.S.C. §1132(a)] 1/ -- if only ultimately to decide in its discretion that the claim is premature and that no relief at this time can be granted; accordingly, we remand for further proceedings not inconsistent with this opinion.

Contex Facts

The plaintiff, George Bonin, was employed since 1964 by American Airlines where he progressed from the position of flight engineer to that of captain.

1/ Section 502(a) permits a participant or a beneficiary of a pension plan to sue, and Section (e)(1) [29 U.S.C. §1132(e)(1)] gives the District Court jurisdiction of such suits. A potential ERISA plaintiff is granted a wide choice of Federal Court venue, liberal service of process rules, and relief from the jurisdictional amount requirement. See 29 U.S.C. §1132(e)(2) and 29U.S.C. §1132(f).

After an off-duty incident at his Irving, Texas apartment on January 18, 1976, the plaintiff was dismissed from the service of American Airlines.

On May 18, 1976, Mr. Bonin, through his representative, the Allied Pilots Association, applied to have his discharge arbitrated by the Pilot's System Board of Adjustment, pursuant to the collective bargaining agreement between American Airlines and the airline pilots in the service of American Airlines as represented by the Allied Pilots Association. The discharge grievance has been docketed but apparently due to the Plaintiff's failure to prosecute his claim, an arbitration proceeding has not yet been scheduled.

On May 29, 1976, Mr. Bonin applied for disability benefits under the American Airlines, Inc. Pilot Retirement Plan.

Section 12.4 of this Retirement Plan provides:

> Effect of Certain Determinations under other Agreement. In administering the Plan, the Administrator shall be bound by any determination pursuant to the Agreements between American Airlines and the Air Line Pilots in the service of American Airlines as represented by Allied Pilots Association, effective January 14, 1976 and April 1, 1977, as applicable, affecting such issues as discharge of a Member or group of Members. The Administrator shall not administerthe Plan in any manner inconsistent with a final determination under such Agreements. Notwithstanding any other provision neither the interpretation of the Plan nor its administration shall as such be within the jurisdiction of such Agreements.

Record on Appeal at 40 (emphasis supplied).

The Plan Administrator has steadfastly adhered to the position (and repeatedly informed the plaintiff to this effect) that no action on plaintiff's disability claim could be made until there was a resolution by the Pilots' System Board of Adjustment of his pending discharge grievance.

The plaintiff thereafter brought this suit under ERISA that seeks to recover not only the pension benefits allegedly owed him under the plan [29 U.S.C. §1132(a)(1)(B)], but also certain statutorily prescribed penalties arising from the defendants' alleged refusal to supply the plaintiff with specific documents relating to the plan (Summary Plan Description and the latest annual report of the plan)2/ and attorney's fees.3/ Additionally, the plaintiff's complaint alleges the breach of

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2/ Section 502(c) of ERISA, 29 U.S.C. §1132(c), empowers a District Court in its discretion to impose a fine of up to $100 per day on "[a]ny administrator who fails or refuses to comply with a request for any information which such administrator is required . . . to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to . . . the requesting participant or beneficiary within 30 days after such request. . ." The time limits have been extended under certain circumstances. See 29 C.F.R. §§2520 ,194-5 to .104-6(1976).

See generally Miller & Dorenfeld, ERISA: Adequate Summary Plan Descriptions, 14 Hou. L. Rev. 835 (1977).

3/ Subsection (g) of §502 also empowers the District Court in its discretion to impose reasonable attorney's fees or costs on either party. 29 U.S.C. §1132(g).

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defendants' fiduciary duty4/ and the breach of the defendants' statutory duty not to interfere in any manner with plaintiff's rights under the

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4/ ERISA [29 U.S.C. §1104(a)(1)] requires that:

a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

(A) for the exclusive purpose of:
(i) providing benefits to participants and their beneficiaries; and
(ii) defraying reasonable expenses of administering the plan;
(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circum-

stances it is clearly prudent not to do so; and
(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title.

Retirement Plan and under ERISA.5/ Paragraphs 10 and 11 of plaintiff's complaint respectively; Record on Appeal at 7-8.

5/ Section 510 of ERISA, 29 U.S.C. §1140, reads:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act . . . The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

Section 511, 29 U.S.C. §1141, provides:

> It shall be unlawful for any person through the use of fraud, force, violence, or threat of the use of force or violence, to restrain, coerce, intimidate, or attempt to restrain, coerce, or intimidate any participant or beneficiary for the purpose of interferring with or pre-

venting the exercise of any right to which he is or may become entitled under the plan, this subchapter, section 1202 of this title, or the Welfare and Pension Plans Disclosure Act. Any person who willfully violates this section shall be fined $10,000 or imprisoned for not more than one year, or both.

The Railway Labor Act

The Railway Labor Act establishes mandatory procedures for the resolution of disputes within its coverage. The Act recognizes two kinds of disputes, delineated by the Supreme Court as "major" and "minor" disputes. A major dispute concerns the formation of a collective bargaining agreement or the substantial alteration or amendment of an already existing collective bargaining agreement. A minor dispute, on the other hand, involves the interpretation of an existing labor management contract. Elgin, Joliet & Eastern Railway Co. v. Burley, 325 U.S. 711, 723, 65 S.Ct. 1282, 1289-90 (1944), rehearing granted, 326 U.S. 801, 66 S.Ct.

86 (1945), modified, 327 U.S. 661, 66 S.Ct.721.

The Act as extended in 1936 to air carriers [45 U.S.C. §184] requires air carriers and their employees, acting through their representatives, to establish system boards of adjustment for the resolution of disputes between an air carrier and its employees over the interpretation and application of the parties' collective bargaining agreement.6/

6/ 45 U.S.C. §184 relevantly provides:

> The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

See International Association of Machinists v. Central Airlines, Inc., 372 U.S. 682, 83 S.Ct. 956 (1963). These boards of adjustment are the "mandatory, exclusive, and comprehensive system for resolving grievance disputes." Locomotive Engineers v. Louisville & Nashville R. Co., 373 U.S. 33, 83 S.Ct. 1059, 1062 (1963).

Employee Retirement Income Security Act of 1974

The dramatic modern explosion of employee pension plans prompted Congress to enact ERISA. "Prior to the enactment of [ERISA], aggrieved employees were often left without a remedy in seeking to recover benefits allegedly due them under a pension plan. . . or to correct breaches of duty by fiduciaries in their management of Pension funds." Martin v. Bankers Trust Co., 417 F. Supp. 923, 924 (W.D. Va. 1976), aff'd, 565 F. 2d Sess. reprinted in [1974] U.S. Code Cong. & Ad. News at P. 4639. The statute itself contains a succinct unequivocal statement of legislative intent:

> it is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal Courts. 29 U.S.C. §1001(b).

Subject Matter Jurisdiction

Despite its express provision allowing suits over the coverage and application of pension plans to be brought in Federal Court, ERISA was not intended to, nor did it, preempt the mandatory arbitration provisions of the Railway Labor Act. Air Line Pilots Ass'n. v. Northwest Airlines, Inc., 444 F. Supp. 1138, 1141 (D.D.C. 1978), aff'd in part, rev'd in part, No. 78-1285 & No. 78-1383, _____ F.2d _____ (D.C. Cir., filed February 20, 1980), [1980] 88 LAB. L. REP. (C.C.H.) §11,841. This conclusion is supported by the ex-

press statutory provision that ERISA should not be interpreted as displacing any pre-existing federal legislation.1/ Among the laws in effect at the time of the ERISA enactment was the Railway Labor Act.

Therefore, as the plaintiff recognizes, his discharge grievance is governed entirely by the collective bargaining agreement and subject to the jurisdiction of the System Board of Adjustment by the Railway Labor Act.

This preliminary conclusion, however, does not terminate our present inquiry. The resolution of the discharge issue may, as the availability and/or amount of the retirement benefits available to this

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1/ Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulations issued under any such law. 29 U.S.C. §1144(d). The above statutory exceptions are inapplicable to the present case.

plaintiff under this pension plan. However, a forecast of the ultimate success of plaintiff's ERISA claim does not control the threshold determination of Federal Court subject matter jurisdiction.

Under Section 12.4 of the plan the determination as to the wrongfulness of the discharge will be final and binding to the extent it controls the availability or computation of benefits under the pension plan (the degree to which, if any, should be determined by the District Court in the first instance), since "[t]he Administrator shall not administer the Plan in any manner inconsistent with a final determination" under the collective bargaining agreement. There is presently no final determination of the discharge matter that could potentially affect plaintiff's right to disability benefits. Section 12.4 of the Retirement

Plan does not require the Plan Administrator to defer action on Mr. Bonin's pension claim until a final determination is made by the Pilots' System Board of Adjustment regarding the arbitration of the plaintiff's discharge; it merely requires the Plan Administrator not to administer the pension plan inconsistently therewith.

Our holding that the District Court has jurisdiction over plaintiff's pension claim under Section 502(a) of ERISA is supported by a recent decision of the District of Columbia Circuit Court of Appeals. In Air Line Pilots Ass'n. v. Northwest Airlines, Inc., supra, the parties agreed as part of their pension plan that the adjustment board would hear all disputes arising out of the application and interpretation of the pension plan. The District Court dismissed the pension claim for lack of subject matter

jurisdiction, since the pension dispute under the particular circumstances had to be submitted to binding arbitration under the Railway Labor Act because the pension issue concerned the interpretation and application of a collective bargaining agreement. The Court of Appeals affirmed the dismissal so far as the action related to the application and interpretation of the pension plan, but reversed the dismissal to the extent that the complaint alleged violations of ERISA that were independent of the coverage and meaning of the pension plan (e.g., the breach of fiduciary and disclosure requirements).8/

8/ The defendants' reliance on De La Rosa Sanchez v. Eastern Airlines, Inc., 574 F2d 29 (1st Cir. 1978), as support for the proposition that the plaintiff is required to submit his disability claim to binding arbitration under the Railway Labor Act is misplaced. In Sanchez the plaintiff sought an Eastern Airlines pension and a disability pension from Caribair (a carrier integrated into the Eastern

> system). The collective bargaining agreement between Eastern and the Air Line Pilots Association controlled the former Caribair's pilots' rights to disability pensions. Therefore, the terms of a collective bargaining agreement were necessarily at issue in determining the plaintiff's right to benefits. In the case at bar, the pension plan is not maintained pursuant to a collective bargaining agreement.

In this case the plaintiff has similarly presented the independent claims of breach of fiduciary and disclosure requirements, and the District Court under the Airline Pilots Ass'n. v. Northwest Airlines rationale would clearly retain jurisdiction over these independent statutory claims even if plaintiff's pension claim had to be submitted to be binding arbitration.

However, the plan before us significantly provides that "neither the interpretation of the Plan nor its administration shall as such be within the jurisdiction" of the collective bargaining

agreement. Congress by enactment of ERISA endorsed in effect two alternative methods of administering pension plan claims for employers whose collective bargaining disputes are governed by the Railway Labor Act: (1) arbitration of employee pension claims or (2) independent administration of claims by the pension plan administrator with a federal right or review pursuant to ERISA:

> The most that can be gathered from . . . [ERISA's] background is that Congress did not wish to require all benefit plans to offer an arbitral remedy, nor did it desire to make it possible for any collective bargaining agreement, no matter in what industry or business, to make arbitration compulsory.

Air Line Pilots Ass'n. v. Northwest Airlines, Inc., supra, ____ F.2d at ____, [1980] 88 LAB. L. REP. (C.C.H.) §11841 at 23,452 (emphasis in original). Since the pension plan in this case is not maintained pursuant to a collective bargaining agreement, the District Court has jurisdiction of plaintiff's pension claim under ERISA.

At this time, however, we express no preference as to the various alternatives

(suggested by the jurisprudence) available to the District Court in proceeding with the pension dispute on its merits:

1. The District Court could award the lower of the pension rights as between disability and discharge for cause subject to the employer's right of recoupment should the arbitration proceeding ultimately result in the plaintiff's reinstatement. See Kulchin v. Spear Box Company, Inc. Retirement Plan, 451 F. Supp. 306, 312 (S.D.N.Y. 1978).

2. The District Court could award the higher disability pension rights subject to the employer's right of recoupment should the arbitrator order the plaintiff reinstated or decide the plaintiff was discharged for cause. Id.

3. The District Court could suspend its own proceedings until the completion of the arbitral process. Air Line Pilots Ass'n. v. Northwest Airlines, Inc., supra, ____ F.2d at _____, [1980] 88 LAB. L. REP. (C.C.H.) §11,841 at 23,453.

With the benefit of the fuller factual development that will result from this remand, the District Court in its discretion can choose the most appropriate alternative.

Summary

In summary, we hold that the District Court has subject matter jurisdiction under Section 502(a) of ERISA [29 U.S.C. §1132(a)] over plaintiff's pension claim under this pension plan that expressly states its independence from the collective bargaining agreement. Accordingly, we reverse and remand for fuller factual development and for further proceedings not inconsistent with this opinion.

Opinion of the District Court

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Texas
Dallas Division

CIVIL ACTION
NO. CA 3-78-0280-C

GEORGE W. BONIN,

v.

AMERICAN AIRLINES, INC., and THE AMERICAN AIRLINES, INC. PILOT RETIREMENT PLAN

FILED MAY 17, 1983

OPINION

Plaintiff has sued under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1001 et seq. for disability benefits denied to him by Defendant and a discretionary penalty of up to $100 per day that may be awarded for failure of a plan administrator to furnish information that ERISA mandates be furnished. See 29 U.S.C. §1132.

This Court once dismissed this civil action for lack of subject matter juris-

diction. The Fifth Circuit reversed at 621 F.2d 635 (1980) and at page 640 gave this Court three options upon remand. The Court chose the third option and stayed this civil action until the conclusion of arbitral proceedings between Plaintiff's union and the Defendant.

Those proceedings have been completed with a finding that Plaintiff was discharged with just cause by Defendant. To this Court's knowledge, that decision has not been directly challenged by Plaintiff or his union in any court.

Ordinarily, the standard of review of a decision of a plan administrator is whether or not the decision was arbitrary and capricious?

Dennard v. Richards Group, Inc., 681 F2d 306 (5 Cir. 1982). As the Fifth Circuit recognized at p. 636 of its opinion in this case, Defendant as plan administrator for the plan covering Plaintiff,

cannot take any action inconsistent with a final determination as to any issues such as discharge made under the procedures of the collective bargaining agreements of Plaintiff's union and Defendant.

That plan also provides, in pertinent part, in Section 6.4 that:

> Disability of a Member. A Member whose employment as an Active Pilot Employee is terminated by reason of Disability prior to Normal Retirement Date shall be entitled to receive Normal Retirement Benefits commencing at the later of Normal Retirement Date and an applicable Late Retirement Date (or, to the extent permitted by Section 6.2 or 6.5, respectively, Early Retirement Benefits or Deferred Vested Retirement Benefits commencing prior thereto). If such Member does not continue to be employed by the Company, he or she shall be entitled to receive a Disability Retirement Benefit commencing 90 days after the later of the commencement of such Disability and the expiration of such Member's paid sick leave and vacation time accrued as a Pilot Employee, and ending on the earlier of the date such Disability ceases to exist and the date of commencement of such Member's Retirement Benefits. A Member shall be deemed to cease to be an Active Pilot Employee on the date his or her

Disability Retirement Benefit commences.

In short a Member of Defendant's Pilot Retirement Benefit Plan is only entitled to a disability benefit before retirement age when:

1) he or she is terminated as a pilot because of a disability, and
2) he or she is also no longer employed by Defendant.

Plaintiff was terminated by Defendant for cause and not because of a disability. His proper forum for challenging his termination for cause was the grievance and arbitration procedures of his union and Defendant. As Defendant in its other capacity as plan administrator must abide by the outcome of the arbitration, its decision to deny disability benefits was correct and, of course, not arbitrary and capricious.

Plaintiff's other claim is for a fine of up to $100 per day for Defendant's failure to provide him with plan documents as provided for in Section 502(c) of ERISA, 29 U.S.C. §1132(c). Such fines are dis-

cretionary with the court. This court will exercise its discretion and not fine the Defendant for any tardiness by Defendant. Paris v. Profit Sharing Plan, 634 F.2d 357 (5 Cir. 1981), cert. den. 454 U.S. 836 (1981). Also, it appears that Defendant misconceived its duty to furnish documents to Plaintiff because of Defendant's employees confusion over what was then a recently enacted law. Defendant can be at most charged with nonfeasance, not purposeful malfeasance. So, in this instance, the Court does not see any reason why Defendant should be punished.

Plaintiff has, as corollary courts, requested attorneys' fees and punitive damages. As he has not prevailed on his main counts, these issues will not be discussed nor damages awarded and judgment will be awarded to Defendant.

W. M. TAYLOR, SR.
UNITED STATES DISTRICT JUDGE

MAY 17, 1983

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-1513

GEORGE W. BONIN,
Appellant,

v.

AMERICAN AIRLINES, INC. and THE AMERICAN AIRLINES, INC. PILOT RETIREMENT PLAN,
Appellees.

Appeal from the United States District Court for the Northern District of Texas

July 10, 1984

Before Garza, Garwood and Higginbotham Circuit Judges,
Higginbotham, Circuit Judge:*

George W. Bonin, a pilot discharged by American Airlines as a result of his alcoholism, appeals the judgment of the District Court denying his claim to disability retirement benefits under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1001 et seq. American Airlines's System Board of

Adjustment1/ found that Bonin had been charged for "just cause," and the administrator of the Pilot Retirement Benefit Plan thereupon denied Bonin's application for disability benefits on the ground that an employee who has been terminated for just cause has no entitlement to disability benefits2/ The District Court upheld the correctness of this determination, and Bonin appeals.3/ We affirm.

1/ The Board, which arbitrates grievances brought by pilots against the airline, consists of two members appointed by the Company, Two members appointed by the Allied Pilots Association, Bonin's union, and a neutral member who serves as chairman.

2/ Bonin's entitlement to normal pension benefits based on his years of service with American is not in dispute.

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

3/ Bonin also appeals from the District Court's refusal to assess penalties against American for its tardiness in turning over copies of retirement plan documents. See 29 U.S.C. §1132(c). We preceive no abuse of discretion.

Though Bonin was paid temporary disability benefits during an earlier work absence caused by alcoholism and related problems, such benefits did not thereby become "vested," as that term is used in ERISA, and nonforfeitable upon his return to work. Further, we find no merit in Bonin's contention that the employer and plan administrator breached a fiduciary duty to him by failing to warn him that misconduct following his return to work could lead to his discharge rather than a return to disability status.

Under the Pilot Retirement Benefit Plan, disability benefits are due only to a member who "is terminated by reason of Disability." The Plan defines "Disability" to comprise any "illness or injury . . . which prevents a Member from continuing to act as an Active Pilot Employee in the service of the Company, other than . . . (2) alcoholism showing

no progress toward recovery after two years . . ." (emphasis added).

Bonin asserted before the System Board of Adjustment that he was suffering from a severe mental disorder at the time of his discharge, and that the incidents leading to his termination were the result of sickness rather than alcoholism. The Board found, however, that

> there cannot be the slightest doubt that Captain Bonin's problem was alcoholism . . . It appears clear that the Company has been patient in its effort to have Captain Bonin benefit from its alcohol control program, but there has been no sustained improvement. There is no doubt that just cause for the termination has been shown.

Bonin argues that the administrator of the Pilot Retirement Benefit Plan, owing a fiduciary duty to the Plan's members was obliged to make an independent determination of whether or not Bonin was disabled at the time of his termination. The plan explicity provides, however, that "[i]n administering the Plan, the Administrator shall be bound by any determination pursuant to the Agreement between American Airlines and the Air Line Pilots. . . affecting such issues as discharge of a Member . . . The Administrator shall not administer the Plan in any manner inconsistent with a

> final determination under such Agreements." It follows that the Plan Administrator was under no duty--indeed, was not permitted--to make an independent inquiry into the cause for Bonin's firing.

Bonin charges that giving such binding effect to the Board's findings violates the declaration in the Plan that "neither the interpretation of the Plan nor its administration shall as such be within the jurisdiction of such Agreements [respecting pilot discharges]." We disagree. The Board scrupulously avoided considering Bonin's claim of entitlement to disability benefits, and did not intrude into administration of the Plan "as such." It was far the Plan Administrator to determine the effect of the Board's findings on Bonin's claim to benefits under the plan, but the Plan manifestly requires the Administrator not to second-guess the Board's factual findings.

In sum, at the time of his termination Bonin was not suffering from any "disability" as that term is defined in the Pilot Retirement Benefit Plan. Consequently, the denial of his claim for disability benefits was proper.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-1513

GEORGE W. BONIN,
Appellant,

v.

AMERICAN AIRLINES, INC. and THE
AMERICAN AIRLINES, INC.
PILOT RETIREMENT PLAN,
Appellees.

Appeal from the United States
District Court for the Northern District
of Texas

ON PETITION FOR REHEARING

August 23, 1984

Before Garza, Garwood and Higginbotham
Circuit Judges.

Per Curiam:

It is ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

PAT S. HIGGINBOTHAM
UNITED STATES CIRCUIT JUDGE